

Irrelevant Costs and Economic Realities: Funding the IDEA after *Cedar Rapids*

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The Supreme Court in Cedar Rapids held that school districts must pay for nursing services for students with disabilities, regardless of cost, under the IDEA. The author argues that even though the purpose of Cedar Rapids is noble, i.e., to ensure equal access to education for those with disabilities, underfunded school districts will be enfeebled by the decision. Thus, the author concludes that cost should once again be considered a factor under the IDEA in deciding which resources schools should provide for disabled children. The author offers several legislative solutions to take into account the economic reality that school districts face: (1) defining medical services differently, (2) implementing spending caps, (3) allowing an undue-hardship defense for school districts, and (4) financial contributions by Congress to ease the expensive burden put on the school districts by the Cedar Rapids decision.

I. INTRODUCTION

When Garret was four years old, his spinal column was severed in a motorcycle accident, thus rendering him paralyzed from the neck down.¹ While his mental capacities were unaffected,² the accident left him in need of extensive nursing services.³ In 1993, Garret's mother asked Garret's public school district to assume the financial responsibility for the required health-care services during the school day.⁴ The school officials balked. They claimed that the district was

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¹ Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 69 (1999).

² *Id.* Among other things, Garret is able to speak, operate his motorized wheelchair, and operate a computer. His academic performance in regular classes has been described as "a success." *Id.*

³ See *id.* at 69–70 n.3. Garret is "ventilator dependent," which means that he can breathe only with external assistance. *Id.* at 69 n.2. Due to his condition, Garret requires a responsible person nearby that can attend to his needs while he is in school. *Id.* at 69. Among other things, Garret needs urinary catheterization daily and suctioning of his tracheotomy tube typically every six hours. *Id.* at 69–70 n.3. He also needs to be put in a reclined position for five minutes out of each hour. *Id.* The need for one-on-one nursing care is especially important because various emergencies, such as a malfunctioning ventilator or autonomic hyperreflexia (an involuntary reaction to either anxiety or a full bladder), may arise during the school day. *Id.*

⁴ *Id.* at 70.

not obligated to provide such extensive—and expensive—services.⁵ The Supreme Court emphatically disagreed.⁶

In *Cedar Rapids Community School District v. Garret F.*,⁷ the Supreme Court held that the Individuals with Disabilities Education Act (IDEA)⁸ requires public school districts to provide ventilator-dependent students with all-day one-on-one nursing care.⁹ The holding purportedly settled a long debate over whether public school districts were responsible for the expensive nursing care required by students with severe disabilities under the IDEA.¹⁰ However, in drawing its conclusion, the Court surprised scholars by declaring that the cost of such services is entirely irrelevant in any IDEA analysis.¹¹

When we consider the relevance of cost in *any* public school issue, we should remember that “[m]illions of American children are . . . ‘savaged’ by the grossly inferior education they receive.”¹² There are public school districts in the United States that manage broken-down facilities and must hold classes in bathrooms, gymnasiums, hallways, and closets.¹³ Children are being subjected to soaring class sizes because of the ever-shrinking number of teachers.¹⁴ There is a high school principal in East St. Louis that views fire damage as a “low priority” and

⁵ *Id.*

⁶ See *infra* Part II.C.

⁷ *Cedar Rapids*, 526 U.S. 66.

⁸ 20 U.S.C. §§ 1400–1491o (1994 & Supp. IV 1998).

⁹ See *Cedar Rapids*, 526 U.S. at 79 (“[T]he District must fund [the] ‘related services’ [requested by Garret] in order to help guarantee that students like Garret are integrated in the public schools.”).

¹⁰ See *infra* Part II.B.

¹¹ In commentary preceding the Court’s ruling, scholars speculated that cost would be included as a factor for consideration. See Allan G. Osborne, Jr., *Where Will the Supreme Court Draw the Line between Medical and Health Services under the IDEA?*, 128 EDUC. L. REP. 559, 569 (1998) [hereinafter Osborne, *Draw the Line*] (“[T]he Supreme Court is likely to employ a multifactor test similar to that used by the lower courts in decisions such as *Destel* [*v. Bd. of Educ.*, 637 F. Supp. 1022 (N.D.N.Y. 1986)], and *Neely* [*v. Rutherford County Schs.*, 68 F.3d 965 (6th Cir. 1995)].”); see also Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613, 635 (1999) (predicting and lamenting that courts will be reluctant to impose heavier financial burdens on public schools).

¹² Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 714 (1994–95). See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) (discussing the poverty-stricken public school systems in East St. Louis, Illinois; the South Side of Chicago, Illinois; New York, New York; Camden, New Jersey; and Washington, D.C.).

¹³ KOZOL, *supra* note 12, at 114.

¹⁴ *Id.* at 24–25.

dreams of enough funds to replace windows and install a new heating system.¹⁵ It is these school districts, ensnared in a mire of extremely limited funds and unfulfilled necessities, that cannot fathom the Court's disregard of the costs involved in the IDEA. These are the districts that will feel the pinch if they are asked to provide extensive health-care services to a disabled student. While this may appear to be an apocalyptic assessment of the situation created by the Court, it is not altogether unreal. Further, extreme rules are best tested by their extreme applications. Thus, a rule that requires a school district to provide anything without regard to cost should be evaluated as if it were applied to the most financially strained district in the land.

The *Cedar Rapids* Court dangerously ignored the economic realities of the cost of services requested under the IDEA. A public school district's resources are finite, and the financial implications of the *Cedar Rapids* decision could enfeeble an already underfunded school district that is asked—or ordered—to provide expensive health-care services to a particular student with extensive needs. While the IDEA serves a laudable purpose¹⁶ and it has, in fact, provided meaningful access to education for many students with disabilities,¹⁷ this note will show that the Supreme Court incorrectly removed cost as a consideration when interpreting the statute's related-services provision. Further, this note will show that, as an economic reality, the cost of requested services must be taken into account, especially in the context of public schools. However, because the Court is unlikely to overrule recent statutory interpretation, public school officials are forced to rely on Congress to fix the problem. This note predicts that Congress will address the *Cedar Rapids* decision sometime in the near future, and when it does, school officials should be ready with some alternatives to the *Cedar Rapids* rule.

Part II of this note provides the historical and statutory framework for understanding the Court's ruling in *Cedar Rapids*. Part III offers two arguments that the Court incorrectly chose to ignore the cost of services under the IDEA: one argument based on traditional principles of statutory interpretation and another based on the economic realities facing our public schools. Part IV predicts that

¹⁵ *Id.* at 32.

¹⁶ See *infra* note 20 and accompanying text.

¹⁷ Upon signing the 1997 Amendment to the IDEA, President Clinton made the following comments:

Since the passage of the IDEA, 90 percent fewer developmentally disabled children are living in institutions; hundreds of thousands of children with disabilities attend public schools and regular classrooms; 3 times as many disabled young people are enrolled in colleges and universities; twice as many young Americans with disabilities in their twenties are in the American workplace.

Remarks on Signing the Individuals with Disabilities Education Act Amendments of 1997, 33 WEEKLY COMP. PRES. DOC. 830 (June 4, 1997).

Congress may revisit the IDEA in order to address the Court's error and offers alternative solutions that public school officials may pursue.

II. WHERE ARE WE? UNDERSTANDING THE RULE OF *CEDAR RAPIDS*

A. *The Individuals with Disabilities Education Act*

In 1975, Congress enacted the Education of the Handicapped Act.¹⁸ Amended in 1990, this law became the Individuals with Disabilities Education Act (IDEA).¹⁹ One of the primary purposes of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."²⁰ In order to promote this goal, the IDEA authorizes the disbursement of federal moneys to those states that agree to provide children with disabilities a free appropriate public education.²¹ A free appropriate public education must include both special-education and "related services."²² Related services, in turn, are defined as those services that are necessary in order for the child to receive the benefit of his or her special education program.²³ Thus, under the IDEA, a school district in a participating state must provide a disabled student with related services as part of her free appropriate public education.

¹⁸ Education of the Handicapped Act, 20 U.S.C. §§ 611–618 (1964) (current version as Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1491o (1994)).

¹⁹ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1141, 1142 (codified at 20 U.S.C. § 1400(a) (1994)).

²⁰ 20 U.S.C. § 1400(d)(1)(A). Section 1400(d) further provides that:

The purpose of this chapter are—

(1)(B) to assure that the rights of children with disabilities and parents of such children are protected; and

(1)(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

²¹ § 1412(a)(1)(A).

²² § 1401(8).

²³ § 1401(22).

Generally, related services include transportation and certain developmental, corrective, or supportive services.²⁴ More specifically, the IDEA lists several examples of related services, including speech and language pathology, audiology, psychological services, physical and occupational therapy, social and counseling services, orientation and mobility services, and early identification and assessment.²⁵ However, there is one important exemption from the definition of related services, and this exemption is at the center of the controversy. Under the IDEA, related services do not include most “medical services.”²⁶

Because a student’s free appropriate public education must be provided by the public school district at no cost to the student’s parents,²⁷ school districts have a significant interest in which services qualify as medical services and which do not. If a requested service is determined to be medical, it is not included as a related service in a student’s free appropriate education. Thus, schools are not required to provide this service. The essential question of the controversy then becomes: “Which services are medical services and which are not?”

The statute itself provides little guidance, but the courts have formed some generally accepted rules over the years based on the United States Department of Education’s regulations.²⁸ For example, those services that can be classified as typical school-health services are not medical services within the meaning of the IDEA.²⁹ On the other hand, those services that must be performed by a licensed

²⁴ *Id.*

²⁵ *Id.* However, this list is intended to be illustrative, not exhaustive. See Allan G. Osborne, Jr., *Supreme Court Rules that Schools Must Provide Full-Time Nursing Services for Medically Fragile Students*, 136 EDUC. L. REP. 1, 1 (1999) [hereinafter Osborne, *Full-Time Nursing Services*].

²⁶ § 1401(22). While medical services are generally exempted from the definition of related services, medical services that serve diagnostic or evaluative purposes are not so exempted. § 1401(22) (emphasis added) (“The term ‘related services’ means . . . supportive services (including . . . medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education.”). Thus, the general rule is that the IDEA does not require the states to provide medical services to children with disabilities as part of their free appropriate public education.

²⁷ § 1401(8)(A).

²⁸ See Osborne, *Full-Time Nursing Services*, *supra* note 25, at 1 (discussing the general acceptance of the licensed physician exempted from, and school-health services inclusion to, the definition of medical services).

²⁹ See 34 C.F.R. §§ 300.24(4), 300.24(12) (1999) (giving two separate definitions, one for “medical services” and one for “related services”). The IDEA regulations define school-health services as those “services provided by a qualified school nurse or other qualified person.” § 300.24(12).

physician are medical services under the IDEA.³⁰ The real interpretive problem arises when a school district is confronted by services that fall between the two extremes, something substantially more than typical school-health services but something that need not be provided by a licensed physician. Specifically, what is a public school district's obligation under the IDEA to a medically fragile student who requires the services of a full-time nurse that must tend to him or her on a purely one-on-one basis?³¹ Because of the costs implicated by such extensive nursing services,³² this question was seen as especially significant to all public school districts.³³

B. *The Confusion Leading to Cedar Rapids*

The Supreme Court first attempted to draw the line between typical school-health services and medical services in *Irving Independent School District v. Tatro*.³⁴ At the time, Amber Tatro was an eight-year-old girl born with spina bifida.³⁵ Due to a neurogenic bladder, she was unable to empty her bladder voluntarily, and as a result, she required catheterization every three to four hours to avoid damaging her kidneys.³⁶ The need for this catheterization created the controversy. Amber's parents argued that catheterization was a related service for the purposes of the IDEA,³⁷ and as such, the school district was required to provide it.³⁸ The school district argued that catheterization was a medical service and thus not a related service required under the IDEA.³⁹

³⁰ See § 300.24(4) ("Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."). Note, however, that this definition of medical services more closely describes those medical services that are included under the related-services provision—that is, medical services that are for diagnostic and evaluation purposes. See *supra* note 26.

³¹ Garret F.'s services fall squarely within this gray area. They obviously reach beyond the practices of a traditional school nurse, yet they do not require a doctor's supervision. Osborne, *Full-Time Nursing Services*, *supra* note 25, at 1–2.

³² The cost of services for just one child can reach tremendous levels. See *infra* note 134.

³³ Osborne, *Draw the Line*, *supra* note 11, at 560.

³⁴ 468 U.S. 883 (1984).

³⁵ *Id.* at 885.

³⁶ *Id.*

³⁷ At the time of the controversy, the law was known as the Education of the Handicapped Act. See *supra* note 18 and accompanying text.

³⁸ *Tatro*, 468 U.S. at 886.

³⁹ *Id.* at 893.

The Supreme Court adopted a two-prong analysis to the question of whether catheterization was a related service under the IDEA.⁴⁰ First, was catheterization a “supportive service?”⁴¹ Second, was catheterization excluded as a medical service?⁴² The Court made quick work of the first prong and found that catheterization was, in fact, a supportive service.⁴³ The Court then turned to the second prong of its test and found that catheterization was not a medical service.⁴⁴ Relying heavily on United States Department of Education regulations,⁴⁵ the Court drew a bright line between school-health services and medical services.⁴⁶ Under *Tatro*, medical services are those services that can be performed only by a licensed physician.⁴⁷ By negative implication, services that can be provided by *anyone* other than a licensed physician are not medical services but school-health

⁴⁰ See *id.* at 890 (establishing the two questions of the analysis: (1) whether the catheterization was a “supportive service” that Amber required in order to benefit from her special education and (2) whether the catheterization was excluded under the medical-services exemption).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.* (“It is clear on this record that, without having [catheterization] services available during the school day, Amber cannot attend school and thereby ‘benefit from special education.’ [Catheterization] services therefore fall squarely within the definition of a ‘supportive service.’”) The Court then made an analogy between catheterization and other means of access to education, such as ramps and automatic doors. “Services [like catheterization] that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.” *Id.* at 891.

⁴⁴ See *id.* at 895 (“We conclude that provision of [catheterization] to Amber is not subject to exclusion as a ‘medical service’ . . . and . . . that [catheterization] is a ‘related service’ under the [IDEA].”).

⁴⁵ See *id.* at 891–93 (“We begin with the regulations of the Department of Education, which are entitled to deference.”). The IDEA empowers the Secretary of Education to issue regulations necessary to carry out the provisions of the Act. See 20 U.S.C. § 1417(b) (1994); 34 C.F.R. § 300.24(a) (1999) (including school-health services within the definition of related services); § 300.24(b)(10) (defining school-health services as “services provided by a qualified school nurse or other qualified person”); § 300.24(b)(4) (defining medical services as those “services provided by a licensed physician to determine a child’s medically related handicapping condition which results in the child’s need for special education and related services”).

⁴⁶ See *Tatro*, 468 U.S. at 893 (“By limiting the ‘medical services’ exclusion to the services of a physician or hospital . . . the Secretary has given a permissible construction to the [related services] provision.”).

⁴⁷ *Id.* at 893.

services.⁴⁸ Thus, in the Court's view, the IDEA exempts from the school district's financial responsibility only those services that require a licensed physician.

This "licensed physician only" definition of the medical-services exclusion appears quite on point with respect to a school district's responsibility to fund a medically fragile student with all-day, one-on-one nursing care. However, the catheterization services at issue in *Tatro* were intermittent and noncontinuous.⁴⁹ The Court itself, in dictum, posited that the medical-services exclusion was "designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."⁵⁰ School districts faced with the higher costs of providing assistance to children with severe disabilities seized upon this dictum to challenge their financial responsibility for expensive services that were far more extensive than those at issue in *Tatro*.⁵¹

Confused by the dictum of the high Court, the lower courts were divided. Some courts applied *Tatro* as a bright-line test.⁵² Others applied it as a balancing test.⁵³

⁴⁸ The services required by Amber did not require "even the services of a nurse." *Id.* at 894. Rather, the Court makes special importance out of the fact that "a layperson with minimal training is qualified to provide catheterization." *Id.* In fact, the training required to perform catheterization is less than one hour; Amber's parents, babysitter, and teenage brother have all been qualified to perform the procedure. *Id.* at 885.

⁴⁹ See *id.* (describing the catheterization service as taking only a few minutes to perform and required only every three to four hours).

⁵⁰ *Id.* at 892.

⁵¹ See Haekyoung Suh, Note, *The Need for Consistency in Interpreting the Related Services Provision under the Individuals with Disabilities Act*, 48 RUTGERS L. REV. 1321, 1325-26 (1996) ("By adding a fiscal consideration, the Court enabled school districts to justify their refusal to provide assistance to severely disabled children.").

⁵² See, e.g., *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997), *aff'd*, 526 U.S. 66 (1999) ("In *Tatro*, the Supreme Court established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not."); *Morton Cmty. Unit. Sch. Dist. No. 709 v. J.M.*, 986 F. Supp. 1112, 1122 (C.D. Ill. 1997) (giving deference to the agency interpretation advocating the physician/nonphysician bright-line definition of medical services).

⁵³ See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965, 971 (6th Cir. 1995) ("We believe it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy."); *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D.N.J. 1996) ("[T]he application of the determinative reasoning of all cases which have dealt directly with factual circumstances similar to the present controversy compels the conclusion of the court that to require the present Board to assume the responsibility amounts to an undue burden."); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1026 (D. Utah 1992) ("The court does not read *Tatro* to stand for the proposition that all health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school

The courts that found full-time nursing care to be excludable as medical services primarily focused on the cost of the services and their inherent burden upon the school districts.⁵⁴ In particular, the District Court for the Northern District of New York forcefully reiterated *Tatro*'s dictum in *Detsel v. Board of Education*⁵⁵ when it found that Congress explicitly excluded medical services to avoid burdening public schools with the expensive responsibility of providing health care.⁵⁶

On the other hand, the courts that found full-time nursing services not to be medical services, and therefore required as related services under the IDEA,

children"); *Bevin H. v. Wright*, 666 F. Supp. 71, 76 (W.D. Pa. 1987) ("We simply hold that on the facts of the present case, the nursing services required are so varied, intensive and costly, and more in the nature of 'medical services' that they are not properly includable as 'related services.'"); *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1026 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir. 1987) ("In its analysis, the Supreme Court recognized that although meaningful access to education must be afforded handicapped children, medical services which would entail great expense are not required."); *Ellison v. Bd. of Educ.*, 597 N.Y.S.2d 483, 485 (N.Y. App. Div. 1993) (citations omitted) ("Here, the determination that the services were not 'simple school nursing services' . . . but were more akin to 'medical services' which the School District is not required to furnish, has not been shown to lack a rational basis.").

For a general discussion of the lower court opinions following *Tatro*, see Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11, 14-24 (1992) (discussing the federal courts' treatment of cost in IDEA cases); Osborne, *Draw the Line*, *supra* note 11, at 561-68 (discussing the federal courts' treatment of medical services with respect to full-time nursing services specifically); Suh, *supra* note 51, at 1334-55 (discussing the federal courts' treatment of medical services generally).

⁵⁴ See *Neely*, 68 F.3d at 971 ("Since we agree that the services requested by Samantha are inherently burdensome, we express no opinion about the financial cost of hiring a licensed practical nurse rather than a nursing assistant. The undue burden in this case derives from the nature of the care involved rather than the salary of the person performing it."); *Fulginiti*, 921 F. Supp. at 1325 ("The Township [school district] has met here its burden of proving by a preponderance of the evidence that the care required for [the disabled student] is medical in nature and that to provide it would be unduly burdensome upon the District."); *Shannon M.*, 787 F. Supp. at 1030 ("The differences between the level of care required in *Tatro* and the care required by Shannon are significant."); *Bevin H.*, 666 F. Supp. at 75 ("The services Bevin requires are far beyond those, and to place that burden on the school district in the guise of 'related services' does not appear to be consistent with the spirit of the Act and the regulations."); *Detsel*, 637 F. Supp. at 1027, *aff'd*, 820 F.2d 587 (2d Cir. 1987) ("The extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by [the IDEA]."). Because most of these courts primarily focused upon the nature and extent of the services requested, one commentator dubbed this rule the "extent/nature test." Alison Nodvin Barkoff, Comment, *Revisiting De Jure Educational Segregation: Legal Barriers to Attendance for Children with Special Health Care Needs*, 8 CORNELL J.L. & PUB. POL'Y 135, 151-61 (1998).

⁵⁵ 637 F. Supp. 1022 (1986).

⁵⁶ *Id.* at 1026; see also Osborne, *Draw the Line*, *supra* note 11, at 563 ("Congress specifically excluded medical services from the related services mandate out of concern for school districts to not be subjected to excessive costs or the burden of providing medical care.").

applied the "licensed physician only" definition of medical expenses espoused in *Tatro* as a bright-line test.⁵⁷ Thus, due to the Supreme Court's equivocal definition of medical services in *Tatro*, the IDEA was still subject to a major interpretive problem with respect to cost and medical services.

It is clear that schools must provide such students with typical school health services and are not required to provide medical services that must, by law, be performed by a licensed physician. The controversy exists when the student requires a service that falls somewhere in between those two extremes, such as a one-on-one nurse during the entire school day.⁵⁸

The stage was set for the Supreme Court to revisit its decision in *Tatro* and finally settle the issue that it did not then contemplate, a student who required around-the-clock nursing care.⁵⁹ The Court granted certiorari to the Eighth Circuit in order to review that court's decision in *Cedar Rapids Community School District v. Garret F.*⁶⁰

C. *The Bright-Line Test Established by Cedar Rapids*

Following logic very similar to *Tatro*, the *Cedar Rapids* Court expressly held that public school districts are required by the IDEA to provide a ventilator-dependent student all-day nursing care on a one-to-one basis.⁶¹ In determining

⁵⁷ See *supra* note 52.

⁵⁸ Osborne, *Draw the Line*, *supra* note 11, at 568.

⁵⁹ *Id.* It is important to note that, by amending the IDEA without addressing the medical-services issue, Congress itself added to the confusion created by the *Tatro* dictum. See H. Scott Jacobsen, *Shannon M. Continues to Leave Her Controversial Mark on a Utah School District's Medically Demanding Special Education Students*, 1 J.L. & FAM. STUD. 83, 88 (1999) ("Congress had a chance to settle the debate when it made wholesale changes to IDEA in a series of 1997 amendments, but none of the changes addressed the portions of IDEA dealing with 'relevant services' or the 'medical services exclusion.'").

⁶⁰ 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 523 U.S. 1117 (1998).

⁶¹ *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999). The Court endorsed the lower court's application of the two-prong test in *Tatro*. *Id.* at 72; *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997); see also *supra* notes 40-48 and accompanying text. The appellate court first found that the services required by Garret were supportive services since Garret could not attend school unless those services were available during the school day. *Cedar Rapids*, 106 F.3d at 825. In determining whether the services were excludable under the medical-services exemption, the court of appeals reasoned that *Tatro* had established a bright-line test. The court found that the services fell outside the definition of medical services because someone other than a licensed physician could provide them. *Id.* In affirming the appellate court's application of the *Tatro* test, the Supreme Court elaborated only upon the second prong, the first being unchallenged by the school district. *Cedar Rapids*, 526 U.S. at 72.

whether the services required by Garret were excluded under the medical-services exemption, the Court emphatically stated that, under the IDEA, the cost of the services is inconsequential to whether the costs are medical or nonmedical.⁶² Thus, the Court rejected the multifactor test offered by the school district,⁶³ finding that each part of the district's test was geared toward the nature and cost of the services at issue.⁶⁴

By acknowledging the dictum in *Tatro* that gave rise to the confusion among the lower courts,⁶⁵ the *Cedar Rapids* Court took an extra precaution to assure that its holding would be unmistakable.⁶⁶ In closing, and as if to preempt any future challenges to its ruling, the Court proclaimed that "[t]his case is about whether meaningful access to the public schools will be assured, *not the level of education that a school must finance once access is attained*."⁶⁷ Thus, it is now settled that public schools are required by the IDEA to provide all-day nursing care to students who require such services in order to be present in the classroom.⁶⁸ More importantly, it is now well settled that the cost of the services requested by a student with a disability is *completely* irrelevant as a factor in determining a public school's responsibility to provide those services under the IDEA.⁶⁹

⁶² *Cedar Rapids*, 526 U.S. at 76 ("Continuous services may be more costly and may require additional school personnel, but they are not thereby more 'medical.'").

⁶³ The school district proposed a test under which the Court would look at (1) whether the care must be provided on a continuous or intermittent basis, (2) whether the services can be provided by the existing school-health personnel, (3) the cost of the requested services, and (4) the potential consequences for the school district if the services are not properly performed. *Id.* at 75.

⁶⁴ *Id.* at 76-77.

⁶⁵ See *supra* notes 52-60 and accompanying text.

⁶⁶ 526 U.S. at 74 (citations omitted) ("[In *Tatro*, w]e referenced the likely cost of the services and the competence of the school staff as justifications for drawing a line between physician and other services . . . but our endorsement of that line was unmistakable."). The Court seemed to almost sympathize with the school district's concern as it explained that "[t]he District may have legitimate financial concerns, but our role in this dispute is to interpret existing law." *Id.* at 77.

⁶⁷ *Id.* at 79 (emphasis added).

⁶⁸ See Osborne, *Full-Time Nursing Services*, *supra* note 25, at 13 ("In the *Cedar Rapids* decision the Supreme Court unmistakably endorsed the so-called bright line test . . . [and] declared that the only medical or health-related services that are excluded from the IDEA's related services mandate are those that must be performed by a licensed physician.").

⁶⁹ See *id.* at 13 ("The Court's decision also indicates that school districts may be required to expend large sums in order to fully implement the IDEA's least restrictive environment provision."). Under the least-restrictive-means provision, a school district is not only required to provide a disabled student with a free appropriate public education but also "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A) (1994).

III. HOW DID WE GET HERE? WHY THE SUPREME COURT GOT *CEDAR RAPIDS* WRONG

In ruling that cost was irrelevant in an IDEA analysis, the Supreme Court erred in two key respects. First, it abandoned its traditional analytical framework for statutory interpretation based upon agency regulations.⁷⁰ Second, it ignored the economic realities facing our public schools and the implications that its bright-line rule would have on those economic realities.⁷¹ This part of the note deals with each of these errors in turn.

A. *Abandoning the Traditional Rules of Statutory Interpretation*

It is important to note that, above all, *Cedar Rapids* is a statutory construction case.⁷² The Supreme Court has interpreted the statute to necessarily remove cost as a consideration in determining which services are medical and which are not.⁷³ However, an examination of the principles of statutory interpretation and the rationale employed by the Court will reveal that Congress did not remove cost as a consideration when it drafted the IDEA. In fact, Congress probably *intended* for cost to be a factor. This subpart will show that a construction of the IDEA that gives weight to the cost of the services involved is not only a reasonable interpretation of legislative intent, but the more likely interpretation as well.

1. *The Traditional Analytical Framework for Deference to Agency Interpretation*

The watershed case for statutory interpretation in the modern administrative state is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.⁷⁴ In *Chevron*, the Supreme Court set out an analysis that is driven by two essential questions. The first question is "whether Congress has directly spoken to the precise question at issue."⁷⁵ If congressional intent is clear, the analysis is over, and the clearly expressed intent of Congress is controlling.⁷⁶ On the other hand, if the statute does not address the question at issue or addresses the question in a

⁷⁰ See *infra* Part III.A.

⁷¹ See *infra* Part III.B.

⁷² 526 U.S. at 77 ("[O]ur role in this dispute is to interpret existing law.").

⁷³ *Id.* ("Given that § 1401(a)(17) does not employ cost in its definition of 'related services' or excluded 'medical services,' accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress.").

⁷⁴ 467 U.S. 837 (1984).

⁷⁵ *Id.* at 842.

⁷⁶ *Id.* at 842-43.

vague or ambiguous manner, the Court will then look to the relevant administrative agency's interpretation of the statute.⁷⁷ The sole question before the Court then is whether or not the agency's interpretation is "a permissible construction" of the law.⁷⁸ Even though there is an almost unlimited supply of other varied tools of statutory construction,⁷⁹ the bulwark of the analysis is embodied in the two-part test of *Chevron*.

2. The Majority: Inverting the Traditional Analytical Framework

At the outset of its analysis in *Cedar Rapids*, the Supreme Court put forward three primary reasons for its holding: (1) the definition of related services under the IDEA, (2) its previous decision in *Tatro*, and (3) the overall statutory scheme created by the IDEA.⁸⁰ In order to view these reasons from a *Chevron*-type analysis perspective, the first and third reasons for the Court's holding can be appropriately recharacterized as an inquiry into the clear intent of Congress.⁸¹ The second reason for the Court's holding is properly considered an examination of the reasonableness of the Department of Education's interpretation of the statute.⁸²

⁷⁷ *Id.* at 843.

⁷⁸ *Id.*

⁷⁹ For instance, it is an established constitutional rule of construction that the Court will interpret Spending Clause legislation narrowly. *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). Because this rule is of particular relevance to the IDEA, it will be discussed in more detail below. *See infra* notes 108–11 and accompanying text.

⁸⁰ *Cedar Rapids*, 526 U.S. at 73–74.

⁸¹ This is because, in determining the clear intent of Congress, the Court will first look to the plain language of the statute, which defines related services under the IDEA. *See* *United States v. Arn. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). However, in determining the plain meaning of the statute, and in turn Congress's intent, the Court should look at the Act as a whole or as part of the overall statutory scheme created by the IDEA. *See* *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)) (omissions in original) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.'").

⁸² This is because the Court reached its decision in *Tatro* largely on the basis that the regulations promulgated by the Department of Education were a "reasonable interpretation of congressional intent." *Tatro*, 468 U.S. 883, 891–93 (1984). The regulations in place during the dispute in *Tatro* defined medical services as those "services provided by a licensed physician."

As previously discussed above,⁸³ the IDEA requires a participating state to provide a student with a free appropriate public education.⁸⁴ In order to provide this free appropriate education, the states must provide special education and related services.⁸⁵ The IDEA itself provides a definition for related services.⁸⁶ This definition explicitly states that medical services are *not* included in the related services required by the state as part of the disabled student's free appropriate public education.⁸⁷ Thus, the Court's rule depends squarely on its construction of the term "medical services."

Curiously, the *Cedar Rapids* Court began its analysis by noting that "[t]he scope of the 'medical services' exclusion is not a matter of first impression in this Court. In *Tatro*, we concluded that the Secretary of Education had reasonably determined that the term 'medical services' referred only to services that must be performed by a physician."⁸⁸ Given the fact that *Tatro* relied primarily on the administrative regulations,⁸⁹ this analysis appears to invert the *Chevron* framework by placing importance on the reasonableness of the regulations *before* determining whether congressional intent was clear.⁹⁰ Nevertheless, the Court sought to buttress its reliance on the Department of Education's regulation by

34 C.F.R. § 300.24(b)(4) (1999). The current regulations now define medical services as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education." § 300.16(b)(4). Because this definition of medical services narrows the definition of those medical services that *are* included in related services—e.g., medical services for diagnostic or evaluative purposes—it would logically follow that the current regulations *expand* the scope of the medical-services exemption.

⁸³ See *supra* notes 21–26 and accompanying text.

⁸⁴ See 20 U.S.C. § 1412(1) (1994).

⁸⁵ See § 1401(8).

⁸⁶ Specifically, § 1401(22) of the IDEA provides:

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabled conditions in children.

⁸⁷ See *id.* Of course, if the medical services in question are for diagnostic or evaluative purposes, then they are properly included in the related service required for the free appropriate education. See *id.*

⁸⁸ *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73–74 (1999).

⁸⁹ See *supra* notes 45–46 and accompanying text.

⁹⁰ This inversion of the traditional interpretation is a major objection of Justice Thomas's dissent. *Cedar Rapids*, 526 U.S. at 80 (Thomas, J., dissenting). For a more detailed description of the dissent's view, see *infra* notes 96–102 and accompanying text.

noting that the administrative interpretation was consistent with what it thought was a clear statement of Congress's intent.⁹¹ In rejecting the School District's proposed alternative test,⁹² the Court first noted that the plain language of the IDEA makes no mention of the cost of services in the definition of either related services or medical services.⁹³ The Court makes a rather conclusory statement that considering cost would "create some tension with the purposes of the IDEA."⁹⁴ Thus, according to the Supreme Court, cost cannot be a factor in determining whether a school district is required to provide a service under the IDEA. The essential reason for this conclusion is that the Department of Education's regulations create a reasonable definition of related and medical services, and the language of the IDEA itself does not speak to cost.⁹⁵

3. *The Dissent: Putting the Reasonableness of Agency Interpretation in Its Place*

An immediate objection to the Court's opinion in *Cedar Rapids* comes from Justice Thomas in his dissent.⁹⁶ In attacking the holding of *Cedar Rapids*, Justice Thomas focused his attention on the invalidity of the *Tatro* ruling as violative of the traditional rules of statutory construction.⁹⁷ Specifically, he chastised the Court in *Tatro* because it "failed to consider [the] antecedent question [of the clarity of Congress's intent] before turning to the Department of Education's regulations implementing IDEA's related services provision."⁹⁸

Thus, the first of Justice Thomas's major objections to the logic of the *Cedar Rapids* majority was that the analysis should have been cut short at the question of legislative intent.⁹⁹ His position was that the Court had unreasonably defined

⁹¹ See *id.* at 78 ("Congress intended 'to open the door of public education' to all qualified children" (quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 174, 192 (1981))).

⁹² See *supra* note 63 and accompanying text.

⁹³ See *supra* note 73.

⁹⁴ *Cedar Rapids*, 526 U.S. at 77. The Court supported this statement with a general statement of the IDEA's purpose as espoused by its previous opinions. See *supra* note 91.

⁹⁵ Just as cost analysis is not encouraged by the IDEA's definition of medical and related services, it is important to note that such an analysis is neither prohibited nor discouraged.

⁹⁶ *Cedar Rapids*, 526 U.S. at 79–85 (Thomas, J., dissenting). Justice Kennedy was the only other Justice to join in Thomas's dissent.

⁹⁷ See *id.* at 79 (Thomas, J., dissenting) ("Because *Tatro* cannot be squared with the text of IDEA, the Court should not adhere to it in this case.").

⁹⁸ *Id.* at 80 (Thomas, J., dissenting).

⁹⁹ See *id.* ("The Court need not have looked beyond the text of the IDEA, which expressly indicates that school districts are not required to provide medical services, except for diagnostic and evaluation purposes."); see also *Chevron U.S.A., Inc. v. Natural Resources Defense*

medical services by looking to the provider of those services¹⁰⁰ and not to the nature of the services themselves.¹⁰¹ According to Justice Thomas, the provider-based definition ignores the vernacular of our society. "We do not typically think that automotive services are limited to those provided by a mechanic. . . . Rather, anything done to repair or service the car, no matter who does the work, is thought to fall into that category."¹⁰²

Turning to the issue of congressional intent, Justice Thomas then argued that the narrow physician-based definition of medical services does not suit the legislative intent behind the statute. "Congress enacted the IDEA to increase the *educational* opportunities available to disabled children, not to provide medical care for them."¹⁰³ While Justice Thomas based most of his objection to the Court's legislative interpretation on the plain meaning of the medical-services exemption, there is ample evidence in the legislative record to support the fact that Congress had never intended to eliminate cost from the analysis under the IDEA.¹⁰⁴ While it is certainly true that Congress intended "to open the school

Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter.").

¹⁰⁰ *Tatro*, 468 U.S. 883, 889-95 (1984) (defining the term "medical services" as only those services which must be performed by a physician).

¹⁰¹ See *Cedar Rapids*, 526 U.S. at 81 (Thomas, J., dissenting) ("The primary problem with *Tatro*, and the majority's reliance on it today, is that the Court focused on the provider of the services rather than the services themselves.").

¹⁰² *Id.* at 82. "Similarly, the term 'food service' is not generally thought to be limited to work performed by a chef." *Id.*

¹⁰³ *Id.* In fact, prior to the *Cedar Rapids* decision, some school districts had raised concerns that the narrow medical-services exception adopted by some of the lower courts caused the schools to become "mini-hospitals for . . . students demanding full-time nursing care." Jacobsen, *supra* note 59, at 83 (citing *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1029 n.18 (D. Utah 1992)). These concerns were not too far off of the mark. In an era of advancing medical technology, the services that are medical in nature and *must* be performed by a licensed physician are diminishing. Consider the following attack on the physician-only definition of the medical-services definition:

In reality, there are few if any services required by a child as supportive services that must be provided by a doctor. A doctor might prescribe medication or generally supervise treatment, but these are not to be excluded medical services. A doctor would only be necessary for medical procedures that would not be considered supportive services by any definition of the word.

Barkoff, *supra* note 54, at 196 (footnote omitted). Did Congress really insert the medical-services exception into § 1401(22) in order to exclude only services like kidney surgery? Under the Court's definition, would dialysis treatment be a medical or related service? *Id.* at 196 n.457.

¹⁰⁴ During hearings before the Subcommittee on Early Childhood, Youth, and Families of the House Committee on Education and the Workforce, many of the witnesses expressed their concerns over the financial burden that providing the services has placed on the public school system and suggested alternative solutions to the problem. For example, consider the prepared

house door” to all children with disabilities,¹⁰⁵ it did not intend to lower the educational resources available to other nondisabled children in the process.¹⁰⁶ Although the majority in *Cedar Rapids* proclaims that its “rule that limits the medical services exemption to physician services is unquestionably a . . . generally workable interpretation of the statute,”¹⁰⁷ modern vernacular and the legislative history behind the IDEA make the reasonableness of such a definition highly questionable.

Even if we could look past the unreasonableness of the physician-only definition of medical services, Justice Thomas presented another problem with the definition—a constitutional rule of statutory interpretation.¹⁰⁸ Because the Court has always viewed Spending Clause legislation, such as the IDEA, as “a

statement of Mr. Jack Lucas, Director of the East San Gabriel Valley Special Education Local Plan Area:

The Los Angeles County Office of Education . . . support[s] . . . [a] [r]ecognition that primary responsibility for medical and non-educational related services lies with the state’s health and welfare agencies by requiring that states have in place interagency agreements which address provision of services, dispute resolution, and methodologies for reimbursement to school district.

Hearings on H.R. 5, the IDEA Improvement Act of 1997, Before the House Subcomm. on Early Childhood, Youth, & Families of the Comm. on Educ. & the Workforce, 105th Cong. 12 (1997) [hereinafter *IDEA Hearings*]. These interagency agreements found a home in the amended IDEA. See 20 U.S.C. § 1412(12)(A) (1994 & Supp. IV 1998). Consider also the following statement by Ms. Lous Barela, Director of the Upper Solane County Special Education Local Plan Area, Fairfield, California: “The IDEA currently mandates a totally open-ended service delivery system. Unfortunately, there are not unlimited funds.” *IDEA Hearings, supra*, at 77.

¹⁰⁵ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982).

¹⁰⁶ See *IDEA Hearings, supra* note 104, at 16 (statement of Rep. Michael N. Castle):

We need to be sure that we are helping the children that need to be helped. But we can’t break our school systems in doing that, and we certainly can’t prevent or inhibit those children who do not have disabilities to be as well-educated as they can because of expenditures being allocated in a too diverse way to the program helping those with disabilities.

See also Gregory F. Corbett, Note, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Student’s Fundamental Right to Education?*, 40 B.C. L. REV. 633, 639 (1999) (“Recognizing that state and local agencies lacked the necessary financial resources, Congress intended to offer free publicly supported education to special education students without lowering the educational opportunities available to other students.”).

¹⁰⁷ *Cedar Rapids*, 526 U.S. at 76.

¹⁰⁸ *Id.* at 83–84 (Thomas, J., dissenting). This portion of the dissent relies primarily on notions of federalism. See Dennis M. Cariello, Note, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1552–54 (1999) (discussing the implications of *Cedar Rapids* on the Supreme Court’s federalism jurisprudence).

contract between the Government and the recipient of the funds,”¹⁰⁹ Spending Clause legislation must be interpreted narrowly so that the recipients of the funds can adequately assess the deal that they are making.¹¹⁰ Thus, Justice Thomas bluntly accused the majority of “disregard[ing] the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsid[ing] unwary States with fiscal obligations that they could not have anticipated.”¹¹¹ Thus, if there were a reasonable interpretation of the term that would more adequately explain to the states the true obligations of the IDEA, the rule of constructing Spending Clause legislation narrowly would prefer that interpretation.

Justice Thomas offered alternative definitions of medical services from other areas of federal law.¹¹² The gist of these alternatives is that they adequately depict medical services in accordance with the general understanding of the word “medical”—that is, “‘medical’ in nature.”¹¹³

The majority rebutted the “medical in nature” definition with the argument that such a definition would exclude even the traditional school-nursing services

¹⁰⁹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). The contract analogy comes from the fact that the congressional enactment “condition[s] an offer of federal funding on a promise by the recipient.” *Id.*

¹¹⁰ *See Cedar Rapids*, 526 U.S. at 84 (Thomas, J., dissenting) (“[W]e must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.”).

¹¹¹ *Id.* at 85.

¹¹² *Id.* at 81, 81 n.2. Remarkably, this is not a novel concept in the arena of statutory interpretation. Interpretation in light of other statutes is based upon the premise that “[s]tatutory construction . . . is a holistic endeavor.” *United Sav. Ass’n of Tex. v. Timbers of Inwood Forrest Ass’ns*, 484 U.S. 365, 371 (1988) (citations omitted).

A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Id.

¹¹³ *Cedar Rapids*, 526 U.S. at 81, 81 n.2 (Thomas, J. dissenting); *see, e.g.*, 26 U.S.C. § 213(d)(1)(A) (1994) (“The term ‘medical care’ means amounts paid . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”); 38 U.S.C. § 1701(6)(A)(i)–(B)(i) (1994) (“The term ‘medical services’ includes, in addition to medical examination, treatment and rehabilitative services . . . surgical services, dental services . . . optometric and podiatric services, preventative health services, and . . . such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment.”).

that are routinely provided to nondisabled students.¹¹⁴ The majority argues that this is an anomalous result that Congress could not have intended.¹¹⁵

It is difficult to see why such a result would be anomalous, and the majority does not offer any reasoning to this point. We are left to assume that the Court felt that if Congress excluded traditional school-health services from the related-services requirement of the IDEA, then the schools would have *carte blanche* to discriminate against students with disabilities in the administration of these traditional nursing services. But this cannot really be their concern, can it? Would schools stop providing traditional school-health services simply because they were no longer required by the IDEA? The mere fact that we call them "traditional" indicates that the school-health services have been provided for well before the passage of the Education of the Handicapped Act. If Congress had indeed excluded school-nursing services from the IDEA's many obligations, would the schools be free to discriminate against the disabled by rendering these services only to the nondisabled students? The Court seemed to forget that the IDEA is not the only federal disability discrimination law. Title II of the Americans with Disabilities Act prevents any state entity from discriminating against a qualified individual because of his or her disability.¹¹⁶

One commentator attacks Justice Thomas's "medical in nature" definition, claiming that it "does not make sense when compared with other related services that are provided [under the related services provision of the IDEA]."¹¹⁷ The crux of this argument is that the IDEA specifically includes services that are medical in nature, such as physical therapy, in the definition of related services.¹¹⁸ Therefore, a "medical in nature" definition of medical services would rule out those services specifically provided for in the text of the IDEA.¹¹⁹

However, the foregoing argument only serves to solidify Justice Thomas's interpretation of the statute. The commentator overlooks an important aspect of her argument: those medical services with which they are concerned *are in fact specifically included in the text of the statute*. This implicates the rule of

¹¹⁴ *Cedar Rapids*, 526 U.S. at 78 n.10 (majority opinion).

¹¹⁵ *Id.*

¹¹⁶ See 42 U.S.C. § 12132 (1994) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). A public school district is a "public entity" under the Americans with Disabilities Act. See § 12131(1)(B) ("The term 'public entity' means . . . any department, agency, special purpose district, or other instrumentality of a State or States or local government.").

¹¹⁷ Barkoff, *supra* note 54, at 186.

¹¹⁸ See *id.* at 186–88 ("[T]he IDEA specifically lists speech pathology, audiology, physical therapy, and occupational therapy as related services. All of these related services are medical services.").

¹¹⁹ See *id.*

construction that cautions against reading a statute so as to render any of its other provisions superfluous.¹²⁰ If Congress truly intended the medical-services exclusion to cover only those services that must be performed by a licensed physician, what need was there to include physical therapy in the definition?¹²¹ It is far more likely that Congress anticipated a more familiar understanding of the term "medical services" and thus saw it necessary to include a list of services that they feared would be excluded because they fell within such a familiar understanding. By including specifically listed services that are medical in nature within the definition of "required related services," Congress meant to exclude those services that are medical in nature from the medical-services exclusion.¹²²

B. *The Financial Implications of the Cedar Rapids Bright-Line Test*

Although the Supreme Court decided that cost could not be a factor in determining the extent of a school district's responsibility under the IDEA,¹²³ school officials were quick to warn that the Court's decision could have severe financial implications.¹²⁴ By requiring public schools to provide expensive services such as all-day nursing care,¹²⁵ *Cedar Rapids* has added another

¹²⁰ See *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion by Scalia, J.) (describing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). For other Supreme Court cases applying the rule to avoid surplusage, see *Rake v. Wade*, 508 U.S. 464, 471-72 (1993) (stating that courts "generally avoid construing one provision in a statute so as to suspend or supersede another provision"); *Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986); and *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

¹²¹ Assume that the Congress had not included physical therapy in the list of related services required under the IDEA. Given the Court's physician-only definition of medical services in *Cedar Rapids*—which is, arguendo, the correct interpretation of congressional intent—physical therapy would *not* be excluded under the medical-service exemption because a licensed physician is not required to perform it.

¹²² Justice Thomas seizes upon this logic in order to reinforce his interpretation. "[W]here Congress decided to require a supportive service—including speech pathology, occupational therapy, and audiology—that appears 'medical' in nature, it took care to do so explicitly. Congress specified these services precisely because it recognized that they would otherwise fall under the broad 'medical services' exclusion." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 82 (1999) (Thomas, J., dissenting) (citation omitted).

¹²³ See *supra* Part II.C.

¹²⁴ See Mark Walsh, *Educators Say Ruling Could Drain Budgets*, EDUC. WEEK, Mar. 10, 1999, at 1 ("Some school administrators fear a dramatic increase in special education costs in the wake of a Supreme Court ruling last week that districts must pay for individual nursing help needed by students with severe medical disabilities to attend school.").

¹²⁵ See *infra* note 134.

financial burden to an already financially burdened public school system.¹²⁶ This subpart will discuss the financial implications of the bright-line test set forth by the Court.

1. *Why Should We Care about Costs?*

Before turning to the financial implications of the *Cedar Rapids* decision, it is important to discuss precisely why cost should matter. With respect to the IDEA, and to public schools in particular, the cost of services is relevant for two reasons. First, because public schools have limited income,¹²⁷ an examination of its level of expenses is necessary as an economic reality.¹²⁸ Second, the IDEA represents a mandate to the states that, in effect, requires the school districts to fund the free appropriate public education of children with disabilities before allocating money to general-education students.¹²⁹

The expenses associated with all-day nursing care are particularly troublesome to school districts that are already facing budgetary crises.¹³⁰ Thus, the cost of such services simply must, as a simple matter of economic fact, be a consideration in determining responsibility of public schools to provide those

¹²⁶ See Osborne, *Full-Time Nursing Services*, *supra* note 25, at 13 (“These costs come on top of what many school districts feel are already over-burdensome expenses associated with providing special education services.”); see also *supra* notes 12–15 and accompanying text.

¹²⁷ See Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 486 (1998) (“While the importance of education has been acknowledged at the highest levels of government, elementary and secondary education traditionally ha[ve] been thought of as a ‘local good’ and, as such, has been financed through the property tax on the local level.”).

¹²⁸ This is an application of what economists refer to as “the law of scarcity,” which states that goods (and services) are scarce because “there are not enough resources to produce all the goods [and services] that people want to consume.” PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 8, 746 (14th ed. 1992). To understand how this applies to the public school setting, imagine a situation where special education and related services would saddle a public school system with expenses in excess of its budget. It follows that the school district *cannot* provide those services. Michael A. Rebell, Executive Director and Counsel, Campaign for Fiscal Equity, Inc., made this idea clear enough: “[F]iscal resources are limited. . . . [W]e can no longer assume that ours is an affluent society with an ever-expanding pie, that can provide increasing largess to all.” Rebell, *supra* note 12, at 715.

¹²⁹ This is because there is no coincidental mandate to fund general education. See Corbett, *supra* note 106, at 649 (arguing that “the IDEA and state special education statutes effectively require local school districts to fund special education before they can fund general education”).

¹³⁰ Financial uncertainty is particularly troublesome in large cities where public education must compete with other pressing issues of the city (e.g., law enforcement) for municipal tax dollars. For a general discussion of the “municipal overburden” concept, see Rebell, *supra* note 12, at 710–14.

services.¹³¹ Modern public schools draw revenue primarily from local property taxes.¹³² Because this method of taxation is highly unpopular, it is quite difficult for a school district to increase its revenue through an increase in property tax.¹³³ Without alternative means of increasing the public schools' revenues, the IDEA's requirements—obligations that must be accepted regardless of expense—could prove financially crippling to those districts that find themselves in financial straights even before the obligations are imposed.¹³⁴

¹³¹ See Theresa M. Willard, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1178–79 (1998) (“The expense of providing special education and related services, while encompassing a wide range, can be extensive, and although financial considerations alone cannot determine a child’s special education placement, they must nonetheless be a factor in any realistic determination of what a school can and should provide.”).

¹³² Robinson, *supra* note 127, at 486.

¹³³ See *id.* at 512–16 (discussing the high elasticity of the property tax and the “pervasive resistance” of property owners to an increase in tax). Elasticity is a term used by economists to describe the effect that movements in one variable (here, property taxes) have on the movements of another variable (here, residential population). SAMUELSON & NORDHAUS, *supra* note 128, at 735; see also Franklin Foer, *The Taxes Are Coming! The Taxes Are Coming! New Hampshire Heads to the Barricades as Treasonous Talk of Income Taxes Fills the Air*, U.S. NEWS & WORLD REP., Apr. 12, 1999, at 28 (recounting New Hampshire’s short flirtation with income tax as an alternative to property tax); Ellen Lord, *School Levy Backers, Foes Square Off, District “Begging” for Voters’ Support*, CINCINNATI POST, Feb. 7, 2000, at 6A (depicting the battle between property tax levy supporters and opponents in the Cincinnati Public School District); Bill Roberts, *Fumbling School Put Idaho in a Bind: Quest for Funds Goes to Capitol, Court*, IDAHO STATESMAN, Feb. 10, 2000, at 1A (describing the structural troubles afflicting the White Pine School District and its scramble for alternative funding methods after the failure of two school levy increases); Barret Seaman, *A Week in the Life of a High School: Monday 7:30 p.m. School Finance: The High Price of Civic Pride*, TIME, Oct. 25, 1999, at 82 (describing one school board’s uphill campaign “to sell voters on even higher taxes” despite the fact that it is situated within a prosperous, but residential, community). Further, public education officials might soon find that their local support is dwindling even further. As the national population ages and households with school-age children fall into the minority, the public education interest group may begin to thin dramatically. See Robinson, *supra* note 127, at 508–12.

¹³⁴ The costs required by just one student with severe disabilities can sometimes reach tremendous levels. See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995) (explaining that the requested services would cost \$13,000 per year); *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D.N.J. 1996) (showing that the requested services would cost \$95,000 annually); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1022 (D. Utah 1992) (explaining that services requested would cost \$30,000 annually); *Ellison v. Bd. of Educ.*, 597 N.Y.S.2d 483, 485 (N.Y. App. Div. 1993) (showing that services requested would cost \$25,000–\$40,000 annually); see also Charisse Jones, *“Special Needs” also among the Most Expensive*, USA TODAY, Apr. 19, 1999, at 15A (describing a school system that spends roughly \$30,000 to \$35,000 each year on one disabled child, compared to approximately \$15,000 a year on a nondisabled child).

Some commentators have even argued that there is an element of unfairness in a federal statutory scheme that mandates the funding of special education but contains no comparable mandate for general education.¹³⁵ This argument rests on the premise that every dollar allocated by a school district must come from somewhere: "Since school districts do not have an open checkbook, it stands to reason that every dollar spent on a continuous service for one child reduces the amount that can be spent on all children. Thus, the quality of education for all may be diminished."¹³⁶ According to Dr. George Severns, Jr., Superintendent of Schools for the Dover Area School District in Dover, Pennsylvania, this siphoning of special-education money from the general-education funds leads the public to view the IDEA as inherently discriminatory.

Educators have for many years done more with less, but it is becoming increasingly more difficult to address the genuine education need for children with disabilities. As local jurisdictions are forced to carry more of the financial burden, children and youth with disabilities are increasingly being perceived as taking needed educational resources from other children. For example, funding pressures on school systems have led to increased class sizes and higher student-to-teacher ratios.

....

This only further fans the fires of criticism by the taxpayers and shouts of discrimination against the non-handicapped.¹³⁷

The effect of this unequal mandate is magnified by the fact that some commentators argue that the IDEA not only requires schools to provide an education to students with disabilities, but that it requires public schools to help special-education students maximize their potential.¹³⁸

¹³⁵ See Osborne, *Full-Time Nursing Services*, *supra* note 25, at 14; Corbett, *supra* note 106, at 644-50 (arguing that the special education mandate of the IDEA directly reduces the quality of the general education services provided and is therefore discriminatory).

¹³⁶ Osborne, *Full-Time Nursing Services*, *supra* note 25, at 14; see also Jones, *supra* note 134, at 15A ("Some education officials say school systems already are engaged in a delicate balancing act, trying to fulfill federal mandates for educating special-needs children while teaching the rest of their students on strained budgets.").

¹³⁷ *IDEA Hearings*, *supra* note 104, at 110-11 (prepared statement).

¹³⁸ This argument was expressly rejected by the Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 204 n.26 (1982). However, with the passage of the 1997 amendments, the potential-maximizing argument has been renewed. See generally Corbett, *supra* note 106, at 639 n.48 (addressing the 1997 amendments and suggesting that "[t]he purpose of the IDEA . . . has been expanded to ensure a quality education for disabled children, not merely educational opportunity"); Eyer, *supra* note 11 (arguing that the 1997 reauthorization and amendment of the IDEA presents a legislative intent that is no longer consistent with *Rowley*). While the merits of such an argument are beyond the scope of this note, it is important to point out that the *Cedar Rapids* Court cites *Rowley* with approval. *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 77-78 (1999).

Although one commentator who protests the lack of a coincidental mandate for general education stretches his argument as far as a general accusation of unconstitutionality of the whole of special-education funding under the Equal Protection Clause of the Fourteenth Amendment,¹³⁹ this note does not go that far.¹⁴⁰ This note addresses the difficulties that arise at the extremes, where the level of spending required by one student has a significant effect on the level of education provided to all.¹⁴¹ Would the Court maintain its physician-only definition of "medical services" if it were faced with a situation where the services required by *one* child had a truly substantial influence on the level of education received by all other students within the school district?¹⁴²

2. *Maybe It Will Not Cost That Much*

Some commentators believe that it is unlikely that most school districts will feel any substantial strain as a result of the Court's decision in *Cedar Rapids*.¹⁴³ This conclusion is drawn from two underlying propositions. First, the incidence of students that require the type of services requested by Garret is so small that it approaches a level of insignificance.¹⁴⁴ This proposition ignores the specific problem that this note is meant to address—that *one* student, if he required expensive services, could financially cripple *one* school district, if it were already under a sufficient financial strain. The concern here is the wisdom of an absolute

¹³⁹ See Corbett, *supra* note 106 (proposing an Equal Protection challenge to the constitutionality of the funding scheme created by the IDEA).

¹⁴⁰ This note advocates the position that there should be a limit on a school's financial responsibility under the IDEA, not that the entire law established by *Cedar Rapids* is invalid.

¹⁴¹ See Osborne, *Full-Time Nursing Services*, *supra* note 25, at 14.

¹⁴² Such a situation does not have to be hypothetical. In *Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989), it was determined that the student at issue could not receive a satisfactory education unless he was placed in a residential-treatment facility for autistic children. There were no such facilities in the child's home state of Georgia, so his parents placed him in a facility in Tokyo, Japan. Later, he was transferred to a newly opened sister school in Boston. *Id.* at 929. Although *Drew P.* was decided well before *Cedar Rapids*, the Eleventh Circuit concluded that the state's duty to provide the services under the IDEA outweighed the financial burden that these services would impose. Thus, the school district had to fund Drew's education. See Suh, *supra* note 51, at 1353–54. There is no doubt that the services that the school district provided for Drew were costly. Imagine a student like Drew in a rural school district consisting of one hundred students or an urban school district like those discussed *supra* at notes 12–15 and accompanying text.

¹⁴³ See Deborah Rebores & Perry A. Zirkel, *The Supreme Court's Latest Special Education Ruling: A Costly Decision?*, 135 EDUC. L. REP. 331, 338–41 (1999) (explaining how *Cedar Rapids* will have only a slight effect on public schools).

¹⁴⁴ *Id.* at 339. There is some debate over the actual number of such students. Some scholars argue that it is a number close to 2,000 nationwide. *Id.* at 338. Others argue that the number is closer to 17,000. Walsh, *supra* note 124, at 22.

rule that completely ignores cost as a factor. Given this narrow focus, the national aggregate number of children with severe disabilities tells us nothing about how the high costs of one individual child's free appropriate public education affects the budget of that student's school district.

Second, the commentators argue that, even if the cost of services for one child is astronomical, the public school could find financial solace from outside resources.¹⁴⁵ These optimists provide a rather short list of alternative sources of special-education funds.¹⁴⁶ Among the alternatives are interagency agreements with noneducational public agencies¹⁴⁷ and the use of the family's private insurance.¹⁴⁸ Because these alternatives will arguably place a portion of the costs upon the child's family,¹⁴⁹ there is no guarantee that these methods will be implemented, and the rule of law is still that the cost of services can *never* be a consideration under the IDEA.¹⁵⁰

While some of these commentators actively address the issue of cost, others readily dismiss the financial implications,¹⁵¹ and still others almost demonize the school districts that raise financial concerns over certain applications of the IDEA.¹⁵² Is this really a fair representation of public school administrators'

¹⁴⁵ See Rebore & Zirkel, *supra* note 143, at 339–40 (describing “additional funding alternatives”).

¹⁴⁶ See *id.* Alternative sources of funding include interagency agreements with noneducational public agencies, such as Medicaid and the State Children's Health Insurance Program, and the family's private-health insurance. *Id.*

¹⁴⁷ See *id.* For example, a school district could seek funding through Medicaid. *Id.* at 339. It is important to remember, however, that the use of such interagency agreements may not result in any cost to the family of the child. See 34 C.F.R. § 300.13(a) (1999). Thus, it is arguable that these interagency agreements would be unavailable to a school district if they would result in any loss of noneducational benefits to either the family or the child.

¹⁴⁸ Rebore & Zirkel, *supra* note 143, at 340. Of course, this must be done only with the parents' consent and cannot result in any cost to the family. See § 300.13(a).

¹⁴⁹ See *supra* notes 147–48.

¹⁵⁰ Cedar Rapids Cmty. Sch. Dist. v. Garrett F., 526 U.S. 66, 79 (1999).

¹⁵¹ See, e.g., Barkoff, *supra* note 54, at 173–78 (arguing that cost should only be a relevant factor when choosing between “two equally appropriate methods of providing related services” and when “determining whether and to what extent a child should be mainstreamed or should receive residential placement”).

¹⁵² See Lauri M. Traub, Comment, *The Individuals with Disabilities Education Act: A Free Appropriate Public Education—At What Cost?*, 22 HAMLINE L. REV. 663, 684 (1999) (arguing that the schools' lack of adequate funding creates disincentives for schools to provide “the optimum educational services to one handicapped child” and, in turn, proposing to overcome these disincentives by increasing the deference given to parents in determining the appropriateness of their child's education); see also Barkoff, *supra* note 54, at 195–96 (arguing that cost should not be a factor because “it allows schools to foster inappropriate, discriminatory reasons for excluding children with special health care needs”); Note, *Enforcing the Right to an “Appropriate Education”: The Education for All Handicapped Children Act of 1975*, 92 HARV.

motivations?¹⁵³ Given that “[s]chool districts today are faced with providing an infinite number of services with a finite amount of funds,”¹⁵⁴ it is not outside the realm of plausibility to assume that administrators are concerned—and not unreasonably—about the effect that one student’s special education will have on the general-education budget.¹⁵⁵

L. REV. 1103, 1109–10 (1979) (“Even assuming good faith on the part of school officials dealing with the problems of handicapped children, budgetary constraints will inevitably color many decisions and restrict the range of alternatives offered in the formulation of individualized education programs.”); Suh, *supra* note 51, at 1355 (advocating that “a unified judicial approach is needed to deter school administrations from ignoring the IDEA’s mandates.”).

¹⁵³ Arguing that the parent and doctor are the more appropriate decisionmakers when determining whether a severely ill child should or should not attend school, one commentator points to the fact that the school official “is not familiar with the conditions and capabilities of the child.” Barkoff, *supra* note 54, at 198. The problem with this argument is that it can cut both ways. The school official may not be familiar with the “conditions and capabilities of the child,” but he or she is familiar with the “conditions and capabilities” of the school.

The implicit assumption of the critic is that the school official ignores the needs of the child with a disability and concentrates solely on the school district’s pocketbook. However, that assumption can easily be inverted to say that the parent and the doctor concentrate on the needs of the individual child and ignore the needs of the other children who look to the school district’s pocket book for *their* educational services. The validity of both assumptions is highly questionable, and the preceding analysis is only meant to prove that speculation as to the true motives of a school administrator concerned about cost provides very little to the debate.

¹⁵⁴ Traub, *supra* note 152, at 684.

¹⁵⁵ See Corbett, *supra* note 106, at 644–50. Further, one could argue that some of these school administrators have a duty to express their concerns over the general-education budgets of their school districts. Many state courts have found education to be a fundamental right under their respective state constitutions. See, e.g., *Brigham v. State*, 692 A.2d 384, 390 (Vt. 1997) (“[I]n Vermont the right to education is so integral to our constitutional form of government, and its guarantees of political and civil rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification.”); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (“We hold that in this State a constitutionally adequate public education is a fundamental right.”); *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997) (“[T]here is but one system of public education in Ohio . . . created by the state’s highest governing document, the Constitution.”); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (“[W]e agree . . . that education is a fundamental right under the Constitution.”); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (“[W]e do agree . . . that ‘equal opportunity for education’ is a fundamental right.”); *State v. Rivinius*, 328 N.W.2d 220, 228 (N.D. 1982) (“Article VIII of the North Dakota Constitution deals with education and contains a constitutional mandate to provide a system of schools and education within the state.”); *Pauley v. Kelley*, 255 S.E.2d 859, 878 (W.Va. 1979) (“Certainly, the mandatory requirement of ‘a thorough and efficient system of free schools,’ found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State.”); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (“We conclude that without doubt . . . in Connecticut, elementary and secondary education is a fundamental right.”); *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (“We hold that the constitution does establish education as a fundamental right of pupils between the ages of six and twenty-

3. How Much Will Compliance with the IDEA Really Cost?

As discussed earlier, the special needs of one child can sometimes reach astronomical levels.¹⁵⁶ Depending on the individual school district's financial solvency, such services could prove financially devastating to that district.¹⁵⁷ However, the cost of providing one student with all-day, one-on-one nursing care cannot be examined in a vacuum. Drawing again upon the law of scarcity,¹⁵⁸ costs can be magnified by a reduction of resources or an increase of desired goods and services. This subpart discusses the trends in educational funding—both special and general-education funding—that could potentially make some of the IDEA's related services burdensome on school districts that, but for these trends, may have been able to shoulder the cost.

One of the most troublesome trends in education funding is the decreasing—or stagnating—tax base. Property taxes are extremely unpopular, and school districts constantly fight an uphill battle in convincing local property owners to accept higher taxes to fund the ever-increasing needs of the local schools.¹⁵⁹ The uphill battle will soon become even more difficult as the general population begins to age.¹⁶⁰

In spite of this local funding problem, Congress continues to provide only a fraction of the special-education funding promised under the IDEA. The IDEA was passed pursuant to Congress's spending power. Compliance is required only from states that voluntarily accept federal grants.¹⁶¹ Thus, a state is not required to comply if it chooses not to accept the money. Due to the voluntary nature of the

one years. The constitution, by its provisions, assures to every child a basic education.”); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (“Thus, on balance, we hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.”).

¹⁵⁶ See *supra* note 134.

¹⁵⁷ See John W. Borkowski & Alexander E. Dreier, *The 1998–99 Term of the United States Supreme Court and Its Impact on Public Schools*, 138 EDUC. L. REP. 1, 7 (1999) (“*Garret F. [v. Cedar Rapids Community School District]* imposes heavy obligations on school districts.”).

¹⁵⁸ See *supra* note 128.

¹⁵⁹ See *supra* note 133.

¹⁶⁰ See Robinson, *supra* note 127, at 508–09 (predicting a decrease in political support at the local level due to “a generally aging national population”). Another factor leading to the decline of local support for educational concerns, including tax levies, is the fact that “for the first time, households with school-age children constitute a minority of households nationally.” *Id.* at 509.

¹⁶¹ See 20 U.S.C. § 1412(a) (1994) (emphasis added) (“A State is eligible for assistance under this subchapter for a fiscal year *if* the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets [the conditions of this subsection].”).

IDEA as Spending Clause legislation, there is an attractive argument that cost should not be a factor because the states are not forced to accept the statute's burdens.¹⁶² This argument overlooks the fact that acceptance of federal IDEA funds is voluntary in name only. In reality, states are not as free to reject the money as the conditional nature of the grant would suggest.¹⁶³

Further, under the IDEA, Congress promised that the federal government would provide forty percent of the funding needed to cover the expenses that

¹⁶² See Eyer, *supra* note 11, at 635 (arguing that one of the reasons that "funding concerns should not defeat the recognition of a higher level of substantive rights under the IDEA" is that the "states are not required to participate in the grant program offered under the IDEA"); Jones, *supra* note 134, at 15A ("The state receives money from the federal government to fund special-ed services. . . . There's always the argument it's not enough. But under the law, one excuse that a school cannot give is that there's not enough money.") (quoting Arngengel Wells, a case advocate with the Alabama Disabilities Advocacy Program)).

¹⁶³ In reality, voluntary receipt of federal funds is seldom voluntary. See Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 758-59 (1997). Several factors culminate to produce what is referred to as the "flypaper effect." *Id.* at 758. First, federal grants have sophisticated constituencies who have a direct incentive to apply political pressure in order to obtain those grants. The majority of taxpayers who do not directly benefit from the federal grants are unorganized and uninformed with respect to the moneys. This leaves the local official with very few options in the supposedly voluntary decision whether to accept conditional funds. Consider the following application of the flypaper effect to the IDEA specifically:

Nominally the special education act establishes grants which a state is free to receive or reject. . . . The political reality is that the act has well-organized and active constituencies—parents of special education children, the providers of special education services including teachers, administrators and those who train them. A Governor who rejects federal special education funds thereby acquires the worst kind of political enemies—sincere, energetic, well-organized interest groups with a morally potent and substantively compelling cause—while not gaining much (if any) compensating support from the rank-and-file voters, generally unaware of the special education act and its fiscal implications. On the other hand, by acquiescing to the act as the politically-compelled status quo, the Governor accepts the open-ended obligation to provide "free and appropriate" special education, an obligation which the grant funds under the act only in small part. Given the deliberately vague nature of this obligation, its contours are defined to an important degree by a federal administrative agency sympathetic to, if not captured by, the special education community. The upshot is that, as a matter of *realpolitik*, the special education act, while nominally creating an option grant program, in practice functions as a partially (and poorly) funded mandate, requiring state decisionmakers to divert general education revenues which, but for the act and the political dynamics underlying it, might not have funded special education.

Id. at 759-60 (emphasis in original). In fact, the flypaper effect may explain why none of the fifty states refuses the "optional" federal grants provided by the IDEA. See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Act*, 20 U. DAYTON L. REV. 243, 252 (1994).

would be required by the Act.¹⁶⁴ Nevertheless, the federal government actually provides less than ten percent nationwide.¹⁶⁵ The 1997 amendments to the IDEA have provided a new federal funding formula that accounts for each state's poverty rate,¹⁶⁶ but there is still a severe restriction on any yearly increase in federal funding.¹⁶⁷ This lack of federal funding presents a further difficulty. By requiring the states to assume responsibilities for which the federal government will assume only limited financial accountability, the IDEA could correctly be classified as an "unfunded mandate" through which Congress passes the costs of its decisions upon the states.¹⁶⁸

In addition to the limited access to local resources and the lack of adequate funding from Congress,¹⁶⁹ supplying all the desired special-education services is becoming more difficult as overall demand for those services begins to rise.¹⁷⁰ Demand for special-education services is rising as "more and more children with special needs are attending public schools."¹⁷¹ Some commentators, and even some members of Congress, have expressed concern that "too many kids are in

¹⁶⁴ See 20 U.S.C. § 1411(a)(2) (1994):

The maximum amount of the grant a State may receive under this section for any fiscal year is . . . the number of children with disabilities in the State who are receiving special education and related services . . . multiplied by . . . 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

¹⁶⁵ See Willard, *supra* note 131, at 1179 ("Recent data indicates . . . that the Federal government provides only nine percent of the funding for special education."); Traub, *supra* note 152, at 684 ("While the IDEA ideally anticipates the federal government matching forty percent of a state's funds for special education, the actual figure remains around eight to nine percent.").

¹⁶⁶ See 20 U.S.C. § 1411(e) (1994).

¹⁶⁷ See § 1411(e)(3)(B)(iii) ("[N]o State's allocation . . . shall exceed the sum of . . . the amount it received for the preceding fiscal year . . . and that amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.").

¹⁶⁸ See Zelinsky, *supra* note 163, at 742 ("The unfunded mandate [is] an attractive device by which legislators advancing their own political interests opportunistically dispense public largesse to importuning constituencies while deflecting to officeholders at lower levels of government the political costs of taxing to pay for that largesse.").

¹⁶⁹ Following the law of scarcity analysis, the limited access to local funds and the lack of funding from the federal government would constitute an increase in the scarcity of resources. See *supra* note 128.

¹⁷⁰ Thus, students with severe disabilities that require expensive services are not just competing with general-education students for funds. See *supra* notes 135–38 and accompanying text. They are also competing with other special-education students—students who are demanding more services each day. See *infra* notes 171–78 and accompanying text.

¹⁷¹ Rex R. Schultze, *Reading, Writing and Ritalin: The Responsibility of Public School Districts to Administer Medications to Students*, 32 CREIGHTON L. REV. 793, 794 (1999).

special education, some of whom simply need a good reading teacher.”¹⁷² One scholar has suggested that this overlabeling may result from teachers’ frustration with certain children.¹⁷³ Another commentator claims that children are being incorrectly, but purposely, diagnosed as disabled in order to take advantage of the beneficial effect of disability as a legal construct.¹⁷⁴

Whatever the reasons for the problem of overlabeling, public school districts seldom challenge claims under the IDEA, preferring to fund special education over the even higher costs of litigation.¹⁷⁵ Consider the following statement by Representative Michael N. Castle:

[I]t is not the intention of anyone here to make sure that somebody with disabilities does not get what they deserve. But on the other hand, we have to at some point look at what is appropriate in terms of costs and levels and whatever it may be, and I am afraid that this threat of litigation and the due process procedures which are there are to some degree handicapping that process and weighing it against the district itself, which is making the decision, particularly those that live in fear of particularly good attorneys.¹⁷⁶

Further, because the IDEA requires the school district to pay the student’s legal fees should the student prevail,¹⁷⁷ administrators are even more reluctant to challenge a claim.¹⁷⁸

¹⁷² Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 338 (1999); see also H.R. REP. NO. 105-95, at 89 (1997) (“Today, the growing problem is over identifying children as disabled when they might not be truly disabled.”).

¹⁷³ See Schultze, *supra* note 171, at 795 (“[I]n a school environment, teachers quickly become frustrated with children who are unable to conform to the rigors of the classroom environment; therefore, teachers label many of these children ‘learning disabled.’”).

¹⁷⁴ See generally Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 296–306 (1999) (discussing “diagnostic dishonesty” where “legal institutions distort the diagnosis of individual patients,” often because a particular, but rigidly classified, diagnosis is the means to benefits under some legal entitlement scheme).

¹⁷⁵ See Corbett, *supra* note 106, at 648 (“[M]ost local school districts choose to pay for the increased special education costs rather than challenge [such services] in court because litigation expenses are even more costly.”).

¹⁷⁶ *IDEA Hearings*, *supra* note 104, at 43–44 (statement of Rep. Michael N. Castle).

¹⁷⁷ See 20 U.S.C. § 1415(i)(3)(B) (1994) (“In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party.”).

¹⁷⁸ This reluctance to litigate most fringe cases has caused many parents to come forward with astonishingly absurd claims under the IDEA. Consider the plight of James Fleming, superintendent of the Capistrano Unified School District:

Fleming has had to battle lawyers who have demanded karate lessons for a kindergartner with an immune system disorder and school-paid trips to Disneyland for a child who was depressed.

Finally, there are hidden costs in providing "medical-type" services, such as the cost of potential liability to the school district for malpractice.¹⁷⁹ By expecting public schools to provide these medical-type services, the IDEA implicitly raises concerns about the liability of the district should the services be provided in manner that could give rise to tort liability.¹⁸⁰ This increased exposure to tort liability should also be considered in determining the overall cost of these medical-type services.

IV. "THERE MUST BE SOME KIND OF WAY OUT OF HERE":¹⁸¹ CONGRESS TO THE RESCUE?

Having established that cost is a relevant part of the economical realities of our society, we see that cost simply *must* be a factor in determining whether the IDEA requires a public school—with limited resources—to provide expensive health-care services to a severely disabled student. However, the Supreme Court has declared, in unequivocal terms, that cost is *not* a relevant factor in the inquiry.¹⁸² Thus, public school officials find themselves caught between a rock

One attorney argued that a child who had seizures as the result of an operation to remove a brain tumor should be entitled to horseback riding lessons as rehabilitative therapy.

Lisa Gubernick & Michelle Conlin, *The Special Education Scandal*, FORBES, Feb. 10, 1997, at 66. Obviously, the situations described above represent the extreme. Nevertheless, the costs involved in fully defending the denial of even the most outlandish claims often force public schools to concede IDEA requests that would lose on the merits had the school thought it prudent to fight. Consider again the comments of Rep. Michael N. Castle:

[V]irtually every school district I have talked to is scared to death of litigation. They incur their own attorneys' fees regardless, and they don't want to do that. They don't want to take the risk of paying the attorneys' fees of the suppliant, the plaintiff . . . plus whatever the other cost may be, and they find that generally speaking the easier way is to resolve it in some way or another. And often that resolution ends up being very expensive as well.

IDEA Hearings, *supra* note 104, at 43–44.

¹⁷⁹ The term "medical-type services" is a recognition that common parlance would consider services like catheterization to be medical, despite the fact that the Court has declared such services not to be medical, because they can be provided by someone other than a licensed physician. See *supra* note 100 and accompanying text.

¹⁸⁰ See Osborne, *Draw the Line*, *supra* note 11, at 570 ("In many situations the student's medical condition can be life-threatening, especially if proper intervention is not instituted almost immediately. Expecting a school district to provide nursing services under these circumstances could also be considered excessively burdensome. It also raises some serious questions about liability.").

¹⁸¹ JIMI HENDRIX, *All Along the Watchtower*, ELECTRIC LADYLAND (Arista Records 1968).

¹⁸² Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 79 (1999) ("This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained.").

and a hard place. Essentially they are trapped between two contradictory rules of law. The former is a fundamental law of economics.¹⁸³ The latter is the "supreme law of the land."¹⁸⁴ The question then becomes: How do we get out of here?

Because *Cedar Rapids* is a statutory construction case and "considerations of stare decisis have special force in the area of statutory interpretation,"¹⁸⁵ it is highly unlikely that the Court will return to the issue of the IDEA's medical-services exemption. Thus, public school officials must rely on Congress to fix the problem created by the Court's decision.¹⁸⁶ The good news is that this reliance is not altogether unreasonable. Congress has already shown that it is willing to overturn Supreme Court decisions legislatively by amending the IDEA,¹⁸⁷ and given that the legislative history of the 1997 amendments is replete with concerns about overburdening the financial resources of the public schools,¹⁸⁸ Congress may amend the IDEA once more.¹⁸⁹ If and when Congress returns to the IDEA

¹⁸³ See *supra* note 128.

¹⁸⁴ "The Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." U.S. CONST. art. VI, § 2.

¹⁸⁵ "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 171-72 (1988).

¹⁸⁶ In fact, it appears that the *Cedar Rapids* Court was asking Congress to address the issue. "The District *may have legitimate financial concerns*, but our role in this dispute is to interpret existing law . . . [and not] to engage in judicial lawmaking without any guidance from Congress." *Cedar Rapids*, 526 U.S. at 77 (emphasis added). From the Court's perspective, it may have been correctly interpreting an improvident statute, but still the Court decided to exercise judicial restraint. See *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

¹⁸⁷ Allan G. Osborne, Jr. notes:

In the past Congress has responded to Court decisions by amending the IDEA to effectively overturn the decisions. Following *Smith v. Robinson*, [468 U.S. 992 (1984)], . . . Congress passed the Handicapped Children's Protection Act of 1986, which provided for the recovery of attorney's fees by parents who succeeded in an action under the IDEA. In response to *Dellmuth v. Muth*, [491 U.S. 233 (1989)], . . . Congress passed the Individuals with Disabilities Education Act of 1990 which abrogated states' eleventh amendment immunity in lawsuits brought pursuant to the IDEA.

Osborne, *Full-Time Nursing Services*, *supra* note 25, at 14 n.45.

¹⁸⁸ See *supra* notes 104-06 and accompanying text (showing the concern of Congress regarding the financial constraints on local schools); see also *supra* notes 121-122 and accompanying text (explaining what medical services Congress most likely meant to cover by the IDEA).

¹⁸⁹ Of course, if Congress does not revisit the IDEA to address the Court's decision in *Cedar Rapids*, public school officials will have a larger problem to face—the acquiescence rule.

for amendment, school officials would be wise to have some solutions available for Congress's consideration. The remainder of this part offers a small list of legislative solutions to the conflict between the physician-only definition of medical services and the economic realities of public school finance.

A. *Defining Medical Services as the Plain Meaning Would Suggest*

One solution to the problem would be to expressly define the definition of "medical services" to more accurately reflect the common understanding of the term.¹⁹⁰ This would most certainly rule out such extensive services like Garret's—services that serve more of a life support purpose than an education purpose. Contrary to the concerns of the critics of such a definition, such a definition would leave services like student-health services and physical therapy intact.¹⁹¹

However, defining the medical-services exemption by the plain meaning of the word "medical" would still require the courts to distinguish medical services from traditional student-health services.¹⁹² Arguably, on average, many special-education students will require more of these health services than the general-education students, and the school would not be allowed to deny such services from the special-education students on account of their disability.¹⁹³ Thus, *distinguishing* medical services under the IDEA's exemption from traditional

See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 814 (2d ed. 1995) ("If Congress is aware of an authoritative agency or judicial interpretation of a statute and doesn't amend the statute, Congress is presumed to 'acquiesce' in the interpretation's correctness."). This principle is most strikingly demonstrated by the famous case of *Flood v. Kuhn*, 407 U.S. 258 (1972). In *Flood*, the Court held that the principles of *stare decisis* precluded it from revisiting prior decisions where Congress, fully aware of those decisions, chose not to legislatively overrule the Court.

We continue to be loath, 50 years after *Federal Baseball [Club v. National League]*, 259 U.S. 200 (1922)] and almost two decades after *Toolson [v. New York Yankees]*, 346 U.S. 356 (1953)] to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Id. at 283–84.

¹⁹⁰ For example, Congress could follow Justice Thomas's suggestion and explicitly borrow the definition of "medical services" from other statutes in the Code. See *supra* notes 112–13 and accompanying text.

¹⁹¹ See *supra* notes 114–22 and accompanying text.

¹⁹² This is because most schools would undoubtedly continue to provide traditional health services. See *supra* notes 114–16 and accompanying text.

¹⁹³ See *supra* note 116 and accompanying text.

school-health services¹⁹⁴ would probably force schools to fall back on the "extent/nature test" previously adopted by the lower courts.¹⁹⁵

The problem with distinguishing medical services from school-health services by using the extent and nature of the services requested is that the extent/nature test "leads to the result that *any* expensive, complex, or constant nursing service will be excluded and the child will not be placed in school."¹⁹⁶ Summarily excluding a child from school *solely* because the services the child requests are expensive may run counter to the purposes of the IDEA.¹⁹⁷ The problem with ignoring costs under the IDEA is that cost is an economic reality facing many schools across the country.¹⁹⁸ Ignoring the fact that some school districts may be able to afford expensive and extensive nursing services would be just as reckless as ignoring cost altogether. Thus, given the strong feelings toward the objectives of the IDEA¹⁹⁹ and the power of the special-education lobby,²⁰⁰ defining the medical-services exemption with popular usage of the word "medical" is not likely to be an attractive compromise to all parties concerned.

B. *Implement Spending Caps*

Another solution to the problem would be to place spending caps on a school district's financial responsibility. "[T]he statute could be redrafted, placing spending caps on individual special education students, specifying certain

¹⁹⁴ Distinguishing medical services from school-health services is quite a different exercise from defining "medical services." Both would be medical according to common usage, but because the school chooses to provide student-health services—rather than being mandated to provide them by the IDEA—it will not be able to deny such services to a disabled student on account of his or her disability. *See supra* note 116 and accompanying text.

¹⁹⁵ *See generally* Barkoff, *supra* note 54, at 151–60 (discussing the lower courts' implementation of the extent/nature test). *See also supra* notes 53–54 (showing how lower courts have interpreted *Tatro*).

¹⁹⁶ Barkoff, *supra* note 54, at 196 (emphasis added).

¹⁹⁷ "The purpose[] of this chapter [is] to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A) (1994).

¹⁹⁸ *See supra* Part III.B.

¹⁹⁹ "I would hate to see one child let go of a program. We never know what the potential of a child is, never." *IDEA Hearings*, *supra* note 104, at 70 (statement of Rep. Carolyn N. McCarthy).

²⁰⁰ *See supra* note 163.

disabilities.”²⁰¹ During the hearings before the House Subcommittee on Early Childhood, Youth, and Families, one witness actually advocated this position.²⁰²

This solution, however, suffers the same infirmities as defining the medical-services exemption in accordance with common parlance.²⁰³ Spending caps, like a broad definition of “medical services,” ignore the financial ability of a school to pay. Once the cost of the services hit a certain point, the child would be denied a public education. Thus, like the solution described in the previous subpart, spending caps may not be the best compromise among the special-education lobby and the public educators.

C. Allow for an Undue-Hardship Defense

If Congress decides that any compromise to the *Cedar Rapids* rule should take into account the ability of the school district to pay for related services, an excellent solution would be to add an undue-hardship defense to the IDEA.²⁰⁴ This is the middle-of-the-road solution discussed by the Seventh Circuit in *Morton Community Unit School District No. 709 v. J.M.*²⁰⁵ The court noted that the IDEA, unlike the Americans with Disabilities Act, does not expressly provide for such a defense.²⁰⁶ However, it noted that it “can be argued that one is implicit in the statutory concepts of an ‘appropriate’ education and ‘related’ services.”²⁰⁷

²⁰¹ Corbett, *supra* note 106, at 667.

²⁰² The proposal was rather innovative, calling for family participation where the services in question exceeded a certain level.

[The] legislation should allow the community to place a cap on the dollar amount spent on each student, handicapped or not, and then for any child whose program cost exceeds [the cap] cost by a designated percentage, the family must be involved in community services, [such as] work[ing] at the school to help alleviate the cost to the community.

IDEA Hearings, *supra* note 104, at 101 (statement of Dr. George Severns, Jr.).

²⁰³ See *supra* Part IV.A.

²⁰⁴ See Corbett, *supra* note 106, at 667 (“[T]he statute could be redrafted . . . prohibiting special education programs from burdening general education.”).

²⁰⁵ 152 F.3d 583 (1998).

²⁰⁶ *Id.* at 586. The undue-burden defense can be found in the Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (1994):

[T]he term “discriminate” includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

²⁰⁷ *Morton*, 152 F.3d at 586.

Perhaps at some point the expense of keeping a disabled child alive during the school day is so disproportionate to any plausible educational objective for the child that the expense should not

It is important to note that *Morton* did not actually endorse the imposition of the undue-hardship test.²⁰⁸ The court held that, even if it were to recognize an undue hardship as a defense to the IDEA, “[t]he school district has made no effort to show that the expense of a full-time nurse for [the student at issue] would be undue in relation to the other calls on the district’s budget.”²⁰⁹ Further, the court went on to show that costs of the services at issue did not, in fact, constitute an undue hardship.²¹⁰ The relevance behind this is that, as the *Morton* court shows, an undue-hardship defense would not systematically eliminate services from students’ free appropriate public education simply because those services are expensive. The cost of services would be viewed in relation to the financial resources of the school district in order to determine whether or not they were unduly burdensome upon the district.²¹¹

This solution would adequately address the problems created by that decision. At the same time, the undue-hardship defense would allow Congress to leave the Court’s interpretation of medical services under the IDEA untouched. Because the undue-hardship defense would neither systematically deny services based on cost nor completely ignore costs in determining whether the services are required under the IDEA, this appears to be the ultimate compromise between the special-education lobby and public educators.

D. *Pay Up*

Finally, Congress could simply pay up and provide the money it supposedly promises under the IDEA.²¹² “[T]he statute could be rewritten such that the federal government must provide more than seven percent of the funding for

be considered a component of an appropriate education for a severely disabled child or a service reasonably related to such an education. So at least the cases that we have cited suggest.

Id.

²⁰⁸ *Id.* (“We need not take sides.”).

²⁰⁹ *Id.*

²¹⁰ See *id.* at 586–87 (discussing the actual costs incurred by the district and its available sources of funds and finding, based on the evidence presented, that the requested services did not constitute an undue burden).

²¹¹ Section 12111(10)(A) defines “undue hardship” as “an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).” 42 U.S.C. § 12111(10)(A) (1994). Among the factors listed in subparagraph (B) are “the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility” and “the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; [and] the number, type, and location of its facilities.” § 12111(10)(B)(ii),(iii).

²¹² See *supra* notes 164–68 and accompanying text.

special education.”²¹³ This would most certainly be in line with the views expressed in the legislative history.²¹⁴

This solution would provide the most pragmatic results. Providing the full forty percent promised by the IDEA will not address the problem of ignoring cost or services under the IDEA. However, it would provide the school with more funds to lighten the burden imposed by the IDEA and its narrow medical-services exemption. Further, by providing the forty percent promised, Congress would, at least in part, assuage the unfunded-mandate problem inherent in the IDEA.²¹⁵ This, in turn, would support the argument that because federal moneys are conditioned upon compliance, cost may not be a defense to the IDEA’s requirements.²¹⁶ As a compromise between the special-education lobby and public educators, this solution requires an empirical inquiry well beyond the scope of this note.

V. CONCLUSION

In *Cedar Rapids Community School District v. Garret F.*,²¹⁷ the Supreme Court ruled that cost is entirely irrelevant in determining which services are required under the Individuals with Disabilities Education Act.²¹⁸ In arriving at its conclusion, the Court disregarded its traditional principles of statutory interpretation.²¹⁹ The result is a rule that will have severe financial implications for American public schools.²²⁰ However, not all hope is lost. Congress may

²¹³ Corbett, *supra* note 106, at 667.

²¹⁴ See *supra* note 138 and accompanying text. The most straightforward comments come from Rep. Carolyn N. McCarthy:

Now, obviously when learning disabled programs were put into effect, the Federal Government, at that time, I think promised up to 40 percent, and I think last year they raised it to 8 percent.

....

... We haven’t done our jobs here on the Federal level as far as giving the States their money. We promised them and we didn’t. We did a terrible job from what I can read in the history. If anything we should be supporting the States more.

IDEA Hearings, *supra* note 104, at 69–70.

²¹⁵ See *supra* notes 162–67 and accompanying text.

²¹⁶ See *supra* notes 161–62 and accompanying text.

²¹⁷ 526 U.S. 66 (1999).

²¹⁸ See *supra* note 11.

²¹⁹ See *supra* Part III.A.

²²⁰ See *supra* Part III.B.

revisit the IDEA at some point in the near future.²²¹ When it does, public school officials should be ready with recommendations for an alternative rule.²²²

²²¹ See *supra* notes 186–87, 189.

²²² See *supra* Part.IV.

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